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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 538

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE PETITIONER.

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BRIEF FOR THE PETITIONER.

The Opinions Below.

The opinions of the United States Court of Customs and Patent Appeals (R. 63) are reported in 61 T. D. 1334. The opinions of the United States Customs Court (R. 51) are reported in 59 T. D. 747.

Jurisdiction.

The judgment of the Court of Customs and Patent Appeals became final through denial of a petition for rehearing on October 10, 1932 (R. 114); mandate was

stayed by order of the presiding judge of that court on October 17, 1932 (R. 115); petition for a writ of certiorari was filed in this Court on December 6, 1932; the petition was granted on January 9, 1933. Jurisdiction of this Court rests upon Section 195 of the Judicial Code, amended by the Act of June 17, 1930, C. 497, Title IV, Sec. 647, 46 Stat. 762 (Sec. 308, Title 28, U. S. C. A.), and Section 8, Act of February 13, 1925, C. 229, par. 8, 43 Stat. 940 (Sec. 350, Title 28, U. S. C. A.). Should the amendment to Sec. 195 of the Judicial Code, made by the Tariff Act of June 17, 1930, be regarded inapplicable, because the importation took place in 1927, the filing of a certificate of importance by the Attorney General would, nevertheless, be unnecessary, inasmuch as the instant proceeding draws in question the construction of the Constitution of the United States.

Questions Presented.

1. Whether, under the Tariff Act of September 21, 1922, C. 356, Title I, Sec. 1, 42 Stat. 858, and particularly paragraphs 218, 228, 360 and 372 thereof, the United States may compel the Board of Trustees of the University of Illinois to pay an ad valorem customs duty upon scientific equipment, to be used exclusively by the University of Illinois in imparting instruction, as a prerequisite to the right to bring such articles into the country, which equipment the University has purchased, and to which it has acquired full legal title abroad, because merchandise of the type required was not obtainable in the United States.

Subordinate questions, implicit in the foregoing and discussed in the Court of Customs and Patent Appeals, are:

(*a*) Is conducting a state educational institution, of the type of the University of Illinois, a strictly governmental function?

(*b*) Is the body corporate, known as the Board of Trustees of the University of Illinois, a strictly public or governmental agency of the State of Illinois? and

(*c*) Is the customs duty such a direct and substantial burden as to come within the doctrine that the federal government is without power directly to burden or embarrass the States or their governmental agencies when engaged in the performance of strictly governmental functions?

Statutes Involved.

The statutes involved appear in the Appendix, pages 30-33, *infra*.

Statement of the Case.

In 1928 the University of Illinois imported some scientific equipment for use in one of its departments. The Collector of Customs held the equipment subject to duty, under the Tariff Act of 1922, which was paid and duly protested; a hearing on the protest was had before the Customs Court at Chicago, on June 25, 1929, terminating in a decision against the importer. The importer contended that this scientific apparatus should be admitted duty free upon these grounds:

"1. Said tax is illegal and wrongfully assessed.

"2. The Federal Government has no authority to impose such duty upon imports made by the State of Illinois.

"3. Such goods are necessary instrumentalities to carry on the governmental operation of the State of Illinois.

"4. The University exercises governmental functions and needs the merchandise heretofore described in the execution of such functions and intends to use the same for such purpose.

"5. The assessment is paid to prevent seizure of the property of the University of Illinois."

As far as the author of this brief has been able to determine, the constitutional question in the instant case had been before a federal tribunal three times before it was submitted to the Court of Customs and Patent Appeals. First in 48 T. D. 728, where no evidence was introduced bearing on the question whether the University of Michigan was a part of the constitutional government of the State, whether it exercised governmental functions of the State, or whether the merchandise imported was to be used by the University for an educational purpose. The case is of no value as a precedent in the case at bar. It may be conceded that the Board of General Appraisers was correct in holding that that case could not be decided in favor of the University upon presumption alone and in the absence of evidence.

The second time the question was before the United States Customs Court was upon a protest filed by the University of Illinois. The case is reported in 54

T. D. 319. In that case the Customs Court, through Mr. Justice Young, held that conducting a university was not strictly a governmental activity, that the property of the institution was subject to the federal taxing power, and that the tariff duty was not a tax upon its franchises.

The question came before the United States Customs Court for the third time in the case of the *University of Illinois* v. *United States*. The opinion of the Customs Court is reported in 59 T. D. 747. The court held against the University, overruled the protests, and required the institution to pay the customs duty.

The facts are not in dispute. The Government offered no evidence. Concisely stated, the facts are as follows: The University of Illinois was organized as a public corporation under a public and general statute enacted by the General Assembly of the State of Illinois in 1867 (R. 5); it is controlled by a Board of Trustees, all of whom were originally named by the Governor (R. 6), but who (nine) are now elected by the people of the State of Illinois (R. 6, Smith-Hurd Revised Statutes of Illinois, 1931, Chap. 144, Sec. 41). The institution was founded for the purpose of furnishing instruction in Liberal Arts, Agriculture, Dentistry, Pharmacy, Law, Business Administration, and Fine Arts; no tuition is charged (R. 35); certain service charges, or fees, are collected from those enrolled (R. 35); student fees "do not in any substantial degree support the University," the Government conceded in the court below (R. 29); the University is supported mainly by taxes levied upon the people of the entire

State of Illinois (R. 12, 34, 37), and partly from appropriations of funds and of lands from the United States Government, and from Congress (R. 5, 34); it gives instruction in branches above the grade of the common school and of the high school; and the entire tax in the instant case was paid by money drawn from the State Treasury and appropriated by the General Assembly; the equipment upon which the tax was paid and collected was for use by the University in the operation of the institution and in imparting instruction under its charter powers (R. 46). All property, title to which is not held in trust under private arrangements, belongs to the State of Illinois (R. 33) and is listed by the State Auditor as "State Property" (R. 11). The University is supported by legislative appropriations out of general tax levies to the extent of over $5,250,000 annually (R. 7, 34, 37); the Governor and the Superintendent of Public Instruction are ex officio members of the governing board (R. 6) of eleven (R. 6, 33); the request for funds is included in the biennial budget submitted by the Governor to the General Assembly (R. 11); the Comptroller of the University reports regularly to the Governor and to the State Auditor (R. 33, 34); it has no endowments the income or principal of which is available for maintenance and operation; it is engaged in no activity primarily for profit (R. 36); and all funds received by the University are devoted to "instructional and educational purposes" (R. 35, 37).

The evidence also shows, without dispute, that an unsuccessful attempt was made to procure the merchandise in the United States, and that the policy and

practice of the institution is not to import in any case where the equipment needed can be purchased in the domestic market (R. 29, 31, 51). The merchandise consisted of electrical and optical machines and instruments and a certain type of glass. The title to the property passed to the Petitioner abroad (R. 42, 49). It was laboratory equipment not acquired for commercial use (R. 45, 46). Congressional appropriations are not available for the purchase of equipment of the kind imported (R. 48).

Specification of Errors Urged.

1. The Court of Customs and Patent Appeals erred in holding that the ad valorem duties collected from the Petitioner upon scientific equipment, which was purchased abroad because not obtainable in the home market, were properly collectible and did not constitute a prohibited burden upon, or an illegal tax on, property of the State of Illinois used by the latter in performing a strictly governmental function.

2. The Court of Customs and Patent Appeals erred in affirming the decision of the Customs Court.

Summary of Argument.

1.

The evidence shows without dispute that the University of Illinois is a public agency of the State; its charter may be and has been amended by the Legislature; its property is State property; and it is governed by State officers and supported by State appropriations.

Educational bodies, such as universities, State fairs, etc., operated by the State and maintained by it in whole or in part out of funds raised by general taxation, or by funds which are the absolute property of the State, are agencies of the State government, and usually are public corporations.

That the University is a governmental agency, is not alone conclusive against the existence of a power in the National Government to tax that instrumentality. In the light of the decision in *South Carolina* v. *United States*, 199 U. S. 437, a State agency is not exempt from federal taxation, unless it be employed in a strictly governmental function as distinguished from an activity which, in its essential nature, is merely "private business."

II.

When a public body or corporation is engaged in an activity, under a duty imposed upon it by the sovereign, from which neither that corporation nor the sovereign expects, or in fact receives, financial or material profit; which is mainly supported either by general taxation or by property or funds, from whatever source derived, that are the absolute property of the agency or of the sovereign; which, in the light of customary and current opinion, is believed to bring benefits, tangible or intangible, to all the people in their collective and individual capacities; and which, as a governmental activity, is sanctioned by time, the course and usage of the government, and the unbroken and universal acquiescence of the people, that is an activity of a strictly governmental character and the

National Government may not exercise the taxing power in such a way as directly to burden a public corporation or a State engaged therein. *Collector* v. *Day,* 11 Wall. 113, 124; *Dobbins* v. *Commissioner,* 16 Pet. 435. The Petitioner is such a corporation.

III.

It has been adjudged by this Court and has, indeed, become axiomatic, that this prohibition is none the less efficacious because implicit, rather than expressly stated, in the federal Constitution; that which is implied is as much a part of that instrument as that which is expressed. *South Carolina* v. *United States, supra; Collector* v. *Day, supra; Clallam Co.* v. *United States Spruce Corporation,* 263 U. S. 34.

IV.

No grant of power in one part, notwithstanding it may be characterized judicially as paramount, can be exerted in violation of any fundamental right secured by other parts of the national Constitution. That is to say, no grant of power can be implied from the existence of another power, if the result of such implication be to destroy a right otherwise expressly or impliedly secured. *Adair* v. *United States,* 208 U. S. 161, 180. Any other conclusion would lead to inconsistency and the mutual cancellation of conceded powers and restrictions. The independence of the States, within their legitimate spheres of action, and the independence of the National Government, in the exercise of the powers conferred upon it by the Con-

stitution, are basic concepts upon which the structure of the National Government is in part rested and without which dual sovereignty in fact would be nonexistent.

V.

A public body or corporation which the State has created for the more convenient exercise of a portion of its sovereign powers, to which have been assigned functions and duties which are of a strictly governmental character, is, together with the property and agents used and employed in the performance of such functions, outside the scope of the Federal taxing power.

> "If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted. Hence, the beginning of such taxation is not allowed."

United States v. *Railroad Co.*, 17 Wall. 322, per Hunt, Justice, 1872. The petitioner is such a corporation.

VI.

The tax challenged is one levied pursuant to the taxing power of the National Government. It is

> "* * * a tax on the article which is paid by the consumer."

Marshall, J., in *Brown* v. *Maryland*, 12 Wheat. 419, 436, 439. It is

> "* * * an enforced contribution to provide for the support of * * *"

the United States. *United States* v. *La Franca,* 282 U. S. 568, 51 S. Ct. 278, 280. The Tariff Act of September 21, 1922, in general, and paragraphs 218, 228, 360 and 372 of Section 1, in particular, are revenue measures. *Hampton and Co.* v. *United States,* 276 U. S. 394.

VII.

This Court has repeatedly held that Congress is wholly without power to levy a tax upon the States, upon the property of the States or their instrumentalities, used in the discharge of strictly governmental functions. The States cannot tax the Federal Government, or any of its instrumentalities. This prohibition is not expressed in the Constitution, but inheres in the necessities of the case. In *Collector* v. *Day, supra,* this Court said:

> "The general government * * * in its appropriate sphere is supreme; but the states, within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the states."

These principles have been often affirmed, and, beyond a few landmarks in constitutional law, it is unnecessary to cite authorities. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Texas* v. *White,* 7 Wall. 700, 725; *Collector* v. *Day, supra; United States* v. *Railroad Co., supra; Veazie Bank* v. *Fenno,* 8 Wall. 533; *Railroad Co.* v. *Peniston,* 18 Wall. 5; *Panhandle Oil Co.* v. *Knox,* 277

U. S. 218; *Indian Motocycle Co.* v. *United States*, 51 S. Ct. 601, 283 U. S. 570; *Coronado Oil & Gas Co.* v. *United States*, 285 U. S. 393.

ARGUMENT.

1. Public corporations possess two kinds of powers: "* * * one governmental and public, and to the extent that they are held and exercised, is clothed with sovereignty—the other private, and to the extent that they are held and exercised, is a legal individual. The former are given and used for public purposes, the latter for private purposes. While in the exercise of the former, the corporation is a municipal government, and while in the exercise of the latter, is a corporate, legal individual." Lloyd v. City of New York, 5 N. Y. 369, 374 (1851).

The foregoing is quoted with seeming approval by this Court in *South Carolina* v. *United States*, 199 U. S. 437, 462. It represents the clearest early statement of the currently accepted distinction between governmental and proprietary capacities of public corporations.

Probably no satisfactory abstract differentiation between governmental and proprietary functions has been made. Indeed, it is believed that no *a priori* criterion, by which to distinguish the two types of function, can be stated. When a public corporation or agency is engaged in an activity, under a duty imposed upon it by the State (*Denver* v. *Davis*, 37 Colo. 370, 86 P. 1027; *Markwardt* v. *Guthrie*, 18 Okla. 32, 90

P. 26), from which neither it nor the State expects, or, in fact, derives financial or material profit; which is mainly supported by general taxation (*Welsh* v. *Rutland,* 56 Vt. 228, *Markwardt* v. *Guthrie, supra*), or by funds which are the property of the State; which, in the light of customary and current opinion, is believed to bring benefits, whether tangible or intangible, to the people in their collective and individual capacities; and which, as a governmental activity, is sanctioned by time, the course and usage of the government, and the unbroken and universal acquiescence of the people (*Loan Association* v. *Topeka,* 20 Wall. 655, 22 L. Ed. 455), that corporation or agency is engaged in an activity strictly governmental in character, and the Nation may not tax the property which the State uses in the performance of the function.

It is our belief that the conclusion is impelled by the analogies of the law that those public corporations which the States have created in order to operate their universities are engaged in performing strictly governmental functions.

There are certain services which, through long experience and by common consent, have come to be looked upon as peculiarly within the province of government, and which, although private corporations may, to a limited degree, perform some of them, are, nevertheless, such that the public interest is deemed better served by having the activities either under the control of, or performed by the government itself. In this class belong lawmaking, the administration of justice and enforcing peace and order and obedience to the law, fire protection, the protection of the public

health, and education of the citizens. There is substantial unanimity among the authorities in denying tort liability, in cases arising in these fields, on the ground that the function is governmental.

> "But neither the Amendment (Fourteenth)—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed the police power, to prescribe regulations to promote the health, peace, morals, *education* and good order of the people * * *."
>
> *Barbier* v. *Connolly*, 5 S. Ct. 357, 113 U. S. 27.

> "Education is one of the purposes for which what is called the police power may be exercised. Massachusetts always has recognized it as one of the first objects of public care."
>
> *Interstate Co.* v. *Massachusetts*, 207 U. S. 79, 87, per Holmes, Justice.

The only tribunal, as far as we know, that has held education to be proprietary rather than governmental in character is the Customs Court. *University of Illinois* v. *United States*, T. D. 43023, 54 T. D. 319. In the case at bar, however, the original author of that doctrine, Judge Young, seemingly abandoned that conclusion and held against the petitioner upon other grounds. Judge Cline still adhered to the earlier view. We think this position wholly untenable, and most seriously urge that such a conclusion as to higher education would be received by the bar and the bench of the country with the gravest misgivings. We believe that the decision of this Court in *Burnet* v. *Coronado*

Oil and Gas Co., 285 U. S. 393, although involving the common or grade schools, is conclusive in principle. We filed a brief as *amicus curiæ* in that case, dealing especially with this point; and the dissenting opinion by Judge Lenroot in the court below, beginning at page 1350, 61 T. D. 1334, fully and ably covers the subject from the legal and historical points of view. We, therefore, pass over this part of the argument without further comment except to refer to *Burnet* v. *Coronado Oil and Gas Co., supra,* our brief as *amicus curiæ* in that case, the dissenting opinion below (R. 83), and *Sappington* v. *Commissioner of Internal Revenue,* 25 B. T. A. 1385, where we also filed a brief as *amicus curiæ* on this point. We do not regard the question as reasonably debatable.

2. Petitioner is a governmental agency.

That the petitioner is in law a public, as distinguished from a private corporation, has long since been settled in Illinois. While this conclusion is not binding on this Court, it is strongly persuasive, especially in the light of the unanimous view of the highest State courts when examining into the character of State institutions organized on like principles. In *Thomas* v. *Industrial University,* 71 Ill. 310, 312, the court said:

> "Is this university, then, a State institution, or is it a private corporation? * * * There is nothing in the act from which it can be inferred that this institution was, in any respect, to be a private corporation, either in whole or in part * * * Private individuals have no

> interest in or control over it, but it is, in every sense of the term, a State institution. It, with its property, management and control, is entirely under the power of the General Assembly * * *."

To the same effect, see *Spalding* v. *People,* 172 Ill. 40; *People* v. *Board,* 283 Ill. 494, 499.

The instrumentalities which the States have created for the purpose of operating universities have generally been held to be public corporations, mere *instrumentalities* or *departments* of the State itself, created for greater convenience in exerting the State's sovereign power over the general field of education. In support of this generally accepted proposition we cite only a few authorities. *State* v. *Chase,* 175 Minn. 259, 220 N. W. 951; *Auditor* v. *Regents,* 83 Mich. 467, 468, 47 N. W. 440, 10 L. R. A. 376; *Oklahoma* v. *Willis,* 6 Okla. 593, 52 P. 921; *Neil* v. *Board, etc.,* 31 Ohio St. 15; *Russell* v. *Purdue University,* 201 Ind. 367, 168 N. E. 529, 65 A. L. R. 1384 (1929); *University* v. *Peoples Bank,* 157 Tenn. 87 (1928).

3. Congress may not tax the States or their governmental agencies.

There is no power in the National Government to tax or impose direct burdens upon or embarrass such instrumentalities of the States as are used in the performance of strictly governmental functions. *Collector* v. *Day,* 11 Wall. 113, 124; *South Carolina* v. *United States, supra; Indian Motocycle Co.* v. *United States,* 283 U. S. 570; and recently in *Burnet* v. *Coronado Oil*

and Gas Co., 285 U. S. 393. The prohibition is implied, is reciprocal, and, as to the Nation,

> "* * * the immunity is derived from the Constitution in the same sense and upon the same principle that it would be if expressed in so many words."

Clallam County v. *United States* and *United States Spruce Corporation*, 263 U. S. 341, 344; and, as said in *Collector* v. *Day*, *supra*, at page 124,

> "The general government * * * in its appropriate sphere is supreme; but the States, within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States."

The present Chief Justice, restating the maxim, says, in *Wilcuts* v. *Bunn*, 282 U. S. 216,

> "* * * that as the means and instrumentalities employed by the General Government to carry into operation the powers granted to it are exempt from taxation by the States, so are those of the States exempt from taxation by the General Government.'

It is equally an aphorism that the amount of the tax is legally unimportant, for the exemption, in this class of cases is absolute. *Indian Motocycle Co.* v. *United States*, *supra*; *Johnson* v. *Maryland*, 254 U. S. 51, 55-56. We make no attempt to cite the numerous decisions of this Court applying these axiomatic propositions.

4. The customs duty is a tax.

The customs duty is

> "* * * a tax on the article which is paid by the consumer."

Brown v. *Maryland*, 12 Wheat. 419, 436, 439, per *Marshall, C. J.; Hampton and Co.* v. *United States*, 276 U. S. 394, 411, 412. The lower court itself has defined a duty as

> "* * * a tax on imports."

United States v. Shallus, 9 Ct. Cust. Appeals 168, 171.

5. The Tariff Act of September 21, 1922 is a revenue measure in the constitutional sense, notwithstanding its provisions are so adjusted as to have a regulatory effect on commerce.

The Tariff Act is a revenue measure. The duties and the classifications are arranged so as to do the least harm and to bring the greatest advantage to domestic industry. This motive has always been present, in one form or another, whenever tariff acts have been under consideration, since 1789. This was pointed out by the late Chief Justice Taft, in *Hampton and Co.* v. *United States*, 276 U. S. 394, at page 411, where he said:

> "The enactment and enforcement of a number of customs revenue laws drawn with a motive of maintaining a system of protection, since the revenue law of 1789, are matters of history."

Continuing, he further said, at page 412:

> "So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxes cannot invalidate congressional action."

That is to say, the Tariff Act of 1922 is a revenue act and not an act for the regulation of commerce. The late Chief Justice concluded:

> "And so here, the fact that Congress declares that one of its motives in fixing the rates of duty is so to fix them that they shall encourage the industries of this country * * * cannot invalidate a *revenue* act so framed." (Emphasis is ours.)

The lower court does not seem to have had a sound grasp of the true meaning of the concept, "primary purpose of an act of Congress"—that it refers to the purpose of an act constitutionally considered. The motives and intent of Congress and the practical effect of enforcement of the law may be one thing, while the purpose, constitutionally considered, may be something else. The latter determines the fundamental nature of the law, notwithstanding the understood and intended economic incidents thereof may completely overshadow its primary purpose. That the primary purpose of tariff acts has, since the foundation of the Nation, been assumed to be revenue rather than regulation of commerce, is, in part, evidenced by the fact that tariff legislation has always designedly originated

in the House of Representatives. Art. I. Sec. 7, Par. 1, Constitution of the United States. The intent of Congress in arranging the schedules of customs duties may have been to encourage—to regulate—certain industries within certain States, a purpose, which, if primary and "shown upon the face of the act" (*Drexel Furniture Co.* v. *Bailey,* 259 U. S. 20, 43) would have been beyond the power of Congress; nevertheless, the act is constitutional because the primary purpose—in the constitutional sense—is revenue, although the desired and undisclosed economic results lie within a field beyond the power of Congress to enter. This precisely is the rationale of *Hampton and Co.* v. *United States, supra.* This principle has been often enounced and applied by this Court. It is illustrated in *McCray* v. *United States,* 195 U. S. 27; *Knowlton* v. *Moore,* 178 U. S. 41; *Veazie Bank* v. *Fenno, supra; United States* v. *Doremus,* 249 U. S. 86; *Hammer* v. *Dagenhart,* 247 U. S. 251; and *Drexel Furniture Co.* v. *Bailey, supra.*

Regulations under the commerce clause (Art. I, Sec. 8, Par. 3) need not be uniform throughout the United States, *Clark Distilling Co.* v. *West. Mo. Ry. Co.,* 242 U. S. 311, 327, per White, C. J.; *Alaska* v. *Troy,* 258 U. S. 101. Customs duties and excises must be uniform. Art. I, Sec. 8, Par. 1. If the position of the lower court be sound, customs duties—Chief Justice Marshall pronounced them taxes—might be one thing at the port of Los Angeles and another for that of San Francisco, etc., and they would be sustained on the claim that they were assessed under the clause to regu-

late commerce, which does not require uniformity. Congress obviously cannot play ducks and drakes with these constitutional powers. The act under which the duty challenged is levied is, in general, a *revenue* act, and the particular paragraphs clearly are revenue provisions.

The lower court confused the power over commerce and the taxing power. When Congress enacts a law providing for import duties, it is exerting the taxing power, and not its power over commerce. This was settled as early as *Gibbons* v. *Ogden,* 9 Wheat. 1, 199, where Chief Justice Marshall says that the act of laying customs duties is an exertion of a "branch of the taxing power." To the same effect, see *State Tonnage Tax Cases,* 12 Wall. 204; and *Hampton and Co.* v. *United States, supra.*

6. The power over commerce is subject to certain constitutional limitations.

It seems, to the writer of this brief, that the lower court attributes to the commerce clause of the Constitution a potency beyond a fair, historically and judicially correct interpretation of its terms. It is our understanding that it has been settled law, since *Gibbons* v. *Ogden, supra,* that

> "* * * the power over commerce * * * is vested in Congress as absolutely as it would be in a single government having in its Constitution the same *restrictions* on the exercise of power as are found in the Constitution of the United States." (Emphasis is ours.)

It is as complete—as paramount—as, but no more so than, the congressional power to tax. *Drexel Furniture Co.* v. *Bailey, supra,* 39. It is, therefore, not an absolute or arbitrary power. One of these "restrictions" is that no power shall be so exerted by Congress as directly and substantially to burden or embarrass the States in the exercise of strictly governmental activities. That this limitation applies to interstate commerce was specifically held in *Adair* v. *United States, supra,* 180, the Court saying:

> "We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution. *Gibbons* v. *Ogden,* 9 Wheat. 1, 196; *Lottery Case,* 188 U. S. 321, 353."

This great tribunal, even when speaking of a power so vital to the very existence of the Nation as is that of taxation, has always made it plain that there is little room for the concept of arbitrary power in our constitutional scheme. In *Veazie Bank* v. *Fenno, supra,* 541, the Court said:

> "There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government of the States, or if exercised for ends inconsistent with the limited grants of power in the Constitution."

The petitioner has never questioned that the power of Congress over foreign commerce is wider than its power over interstate commerce; this results, however, not from the commerce clause, which grants the power to regulate commerce among the several States "in terms as absolute as is the power to regulate commerce with foreign nations" (*Brown* v. *Houston*, 114 U. S. 622, 630), but from the fact that a certain control over foreign commerce may be exerted through the exercise of constitutional powers other than those arising under the commerce clause. The grant (of power over interstate and foreign commerce) is in the same terms, "and the two powers are undoubtedly of the same class and character and equally extensive," *Bowman* v. *Chicago, etc., Ry. Co.*, 125 U. S. 465, 482; and "the power of Congress over interstate commerce is as absolute as is its power over foreign commerce," under the commerce clause. *Crutcher* v. *Kentucky*, 141 U. S. 47, 56. The petitioner repeats that Congress cannot justify a direct tax or burden on a State government or State governmental instrumentality, such as was imposed in this case, by standing on the taxing power, or on that over foreign commerce.

The lower court seems to assume that the power to declare an embargo—Justice Story said that

> "* * * the embargo * * * stands on the extreme verge of the Constitution,"

Story, I, 185, Autobiographical Sketch, 1831—is sustainable exclusively under the *commerce* clause, whereas

its validity rests more logically on the doctrine of "resulting powers" (resulting or implied from a number of enumerated powers), adverted to by Justice Story in his Commentaries on the Constitution of the United States, Book III, Chap. XXIV, but to be carefully differentiated from the concept of inherent powers derived from the notion of "inherent sovereignty" hereinafter considered.

The lower court seems to have regarded Art. I, Sec. 8, Par. 3, of the Constitution as a sort of residuary clause, supplying some, if not all, deficiencies of power suggested by limitations, express and implied, found in other parts of the instrument.

This Court has cautiously applied this doctrine of implied limitation; and it has maintained in careful balance the purpose thereof to preserve State sovereignty, on the one hand, and the intention of the framers of the Constitution to found a sovereign Nation, on the other. There are many express reservations and prohibitions in the Constitution calculated to secure the independence of the States, but, in our judgment, this implied restriction is the last or innermost redoubt, fostered by the far-seeing wisdom of this Court, for their protection against attack from any quarter, regardless of the form of implied or enumerated power in which Congress may panoply its attemped invasion of their right to uphold their own strictly governmental institutions. No principle of constitutional law, and no aspect of economic or public policy, it is respectfully urged, sanction the novel theory concerning the inviolable supremacy of the

ower over commerce exemplified in the decision of
e majority below. Deferentially, but earnestly, we
rge that the grounds thus far advanced in support of
holding against the petitioner, both by the Govern-
ent below and by the Court of Customs and Patent
ppeals, seem but "sharp reasons to defeat the law."

7. The extent of the power of the United States to evy customs duties on importations by State governmental instrumentalities, is measured by the same principles as in the case of excise taxes.

The lower court seems to have misinterpreted the important decision of this Court in *South Carolina* v. *United States, supra.* In that case this Court held that when South Carolina went into the liquor business it took on the character of a private person, with the result that when the United States undertook to tax that "private business," the prohibition, against burdening or taxing State governmental agencies had no application. It is assumed by the lower court that the petitioner is a governmental agency and that conducting a university is a strictly governmental function, but it is held that the limitation on congressional power defined in *Collector* v. *Day* is inapplicable, because the power over commerce is exclusive, and the rule is said not to govern in a field "common to both" State and Nation, such as the field of taxation and the like.

The reasoning of Justice Brewer obviously escaped the attention of the majority members of the lower court. The learned justice said:

> "The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a license tax would exempt the importation of merchandise by a State from import duty."

The point of the observation was that if the contention of South Carolina were sustained, the State, by going into "private business," could dry up the sources of national income and destroy the Federal Government. This Court could not, it seems, say that the "same argument" would lead to the conclusion indicated by Justice Brewer, except for the fact that the implied prohibition against federal burdens on State governmental agencies applied with like force to the exertion of the power to levy customs duties as to the exercise of the power to levy excise taxes; and if a customs duty could be sustained under the commerce clause, as the majority opinion seems to hold, plainly Justice Brewer and this Court could not say that "the same argument" would exempt the importation from duty, as, it was claimed, exempted the sale of liquor from the excise tax. The implied prohibition, then, contrary to the conclusion of the lower court, applies equally in the field of, so-called, exclusive powers, such as commerce, and in fields "common to both" State and Nation, such as taxation.

Assume a law laying an excise on the right to engage in interstate commerce and in commerce with the Indian tribes—an assumption the validity of which seems to be established by *Woodruff* v. *Parham*, 8 Wall. 123. Obviously, if the lower court is correct in holding that the *commerce* clause gives Congress power to levy *customs* duties it must also imply a

power to levy excise taxes on interstate commerce, a proposition which we deny *in toto*. It seems that the argument and conclusion of the lower court lead to the doctrine that when the State of North Dakota—it has no native stone quarries of any kind—must build a new Capitol, because fire destroyed the old structure, and decides to build with stone, Congress may compel that State to pay a tax for the privilege of introducing granite from New Hampshire or limestone from Indiana into interstate commerce for the sole purpose of effectively performing the strictly governmental function of housing its own officers. Or should the State of Minnesota require fire arms for its militia from a Connecticut factory, a like tax could be imposed. The anomaly of denying Congress the power to authorize a tax on the sale of a motorcycle to a city for a policeman's use (*Indian Motocycle Co.* v. *United States, supra*) as a direct and unconstitutional burden on a strictly governmental instrumentality, and permitting such a direct burden when imposed in the assumed exercise of the power over commerce, or of the taxing power over commodities in interstate commerce, seems to have escaped the notice of the lower court. To enforce the implied limitation of power in the one instance and deny its applicability in the other, as did the lower court, appears to us indefensible alike on authority and principle.

8. The extent of the general power of Congress over foreign commerce is not properly at issue in this case.

In our view of this case, the petitioner may safely concede that Congress may, under some grant, or a

totality of grants, of power, in some circumstances, refuse permission to bring the articles in question into the country; Congress, however, has *not* done so, but admits the merchandise in question without any pretense of regulation, save such as incidentally results from the imposition of a tax, imposed *under the taxing power and for the avowed purpose of revenue.* Congress imposes a burden on a sovereign State which, as we think, is *impliedly beyond its constitutional power.*

The extent of the general power of Congress to *regulate* or to *prohibit* foreign commerce, in whole or in part, is not properly an issue in this case; but the real question is whether, Congress having attempted neither a prohibition nor a regulation of, but a *tax* on importations for *revenue purposes,* a State may be taxed on its own property, as is here attempted.

9. If the power to levy the duty challenged is neither an express nor an implied power, it cannot be sustained as an exercise of an inherent power.

There is no such thing as an inherent sovereign power which Congress may exercise notwithstanding it is not expressed and cannot be implied from any granted power. We dismiss this subject with the statement that the doctrine of inherent sovereign powers—sometimes advanced in Congress, and by text writers—has been definitely repudiated by this Court. *Kansas* v. *Colorado,* 206 U. S. 46. The concept, said Justice Brewer in this case.

> "* * * is in direct conflict with the doctrine that this is a government of enumerated powers."

For these reasons it is respectfully submitted that the decision of the lower court should be reversed and the protest of the petitioner sustained.

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February, 1933.

We think the constitutional questions discussed in this brief are of the highest importance. We concur in the arguments advanced and join with the State of Illinois in denying the existence of the power in the National Government to levy and collect the tax protested by the University of Illinois as an importer of scientific instruments for use exclusively for educational purposes in a department of the University.

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APPENDIX.

Statutes Involved.

Act of Congress, April 18, 1818, for the Admission of Illinois, 3 U. St. at Large 428:

> § 6. *And be it further enacted,* That the following propositions be and the same are hereby, offered to the convention of the said territory of Illinois, when formed, for their free acceptance or rejection, which if accepted by the convention, shall be obligatory upon the United States and the said State. * * *
>
> *Third.* That five per cent of the net proceeds of the lands lying within such State, and which shall be sold by Congress, from and after the first day of January, 1819, after deducting all expenses incident to the same, shall be reserved for the purposes following, viz.: two-fifths to be disbursed, under the direction of Congress, in making roads leading to the State; the residue to be appropriated, by the Legislature of the State, for the encouragement of learning, of which one-sixth part shall be exclusively bestowed on a college or university. * * *

Ordinance of Illinois, Accepting Enabling Act. Laws of Illinois, 1819. App., p. 21.

> Whereas, the Congress of the United States, in the Act entitled "An Act to enable the people of the Illinois Territory to form a Constitution and State government, and for the admission of such State into the Union on an equal footing with the original States," passed the 18th of

April, 1818, have offered to this convention for their free acceptance or rejection, the following propositions, which, if accepted by the convention, are to be obligatory upon the United States, viz.: * * *

3. That five per cent of the net proceeds of the lands lying within such State, and which shall be sold by Congress from and after the first day of January, 1819, after deducting all expenses incident to the same, shall be reserved for the purposes following, viz.: Two-fifths to be disbursed under the direction of Congress, in making roads leading to the State; the residue to be appropriated by the Legislature of the State for the encouragement of learning, of which one-sixth part shall be exclusively bestowed on a college or university. * * *

Therefore, this convention, on behalf of, and by the authority of the people of the State, do accept of the foregoing propositions; * * *

Act for the Organization of Illinois Industrial University, approved February 28, 1867. Laws of Illinois, 1867, p. 123.

SECTION 1. * * * That it shall be the duty of the governor of this state within ten days from the passage of this act, to appoint five trustees, resident in each of the judicial grand divisions of this state, who, together with one additional trustee, resident in each of the congressional districts of this state, to be appointed in like manner, with their associates and successors, shall be a body corporate and politic, to be styled "The Board of Trustees of the Illinois Industrial University"; and by that name and style shall have perpetual succession, have

power to contract and be contracted with, to sue and be sued, to plead and be impleaded, to acquire, hold and convey real and personal property; to have and use a common seal, and to alter the same at pleasure; to make and establish by-laws, and to alter or repeal the same as they shall deem necessary, for the management or government, in all of its various departments and relations, of the Illinois Industrial University, for the organization and endowment of which provision is made by this act. Said appointments to be subject to approval or rejection by the Senate at its next regular session thereafter, and the appointees to be and they are hereby authorized to act as trustees as aforesaid, until their successors shall be appointed by the governor and such appointment shall be approved by the senate.[1] * * *

§ 19. This act shall be a public act and take effect and be in force from and after its passage.

Act of Congress, September 21, 1922 (Tariff Act of 1922), C. 356, Title I, Sec. 1, 42 Stat. 858.

An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes * * *

SECTION 1. * * * Except as otherwise specially provided for in this chapter, there

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[1]Nine trustees now (R. 6) and the name has been changed to University of Illinois (R. 6). The Governor and the State Superintendent of Public Instruction are ex officio members. All members are now elected (R. 6, 33).

shall be levied, collected, and paid upon all articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila) the rates of duty which are prescribed by the schedules and paragraphs of the dutiable list of this title, namely; * * *[2]

Par. 218. Biological, chemical, metallurgical, pharmaceutical, and surgical articles and utensils of all kinds, including all scientific articles, utensils, tubing and rods, whether used for experimental purposes in hospitals, laboratories, schools or universities, colleges, or otherwise, all of the foregoing, finished or unfinished, composed wholly or in chief value of glass or paste, or a combination of glass and paste, 65 per centum ad valorem; * * *

Par. 228. Azimuth mirrors, sextants, and octants; photographic and projection lenses, opera and field glasses, telescopes, microscopes, and other optical instruments, and frames and mountings for the same; all the foregoing not specially provided for, 45 per centum ad valorem. * * *

Par. 360. Philosophical, scientific, and laboratory instruments, * * * and parts thereof, * * * 40 per centum ad valorem: * * *

Par. 372. * * * all other machines or parts thereof, finished or unfinished, not specially provided for, 30 per centum ad valorem; * * *

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[2]Repealed by Act of June 17, 1930, Chap. 497, Title IV, Sec. 651 (a) (1), 46 Stat. 762, 71st Congress.